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IN THE

Supreme Court of the United States

October Term, 1978
No. 78-1052

THEODORE ROBERT BUNDY and
MILLARD C. FARMER, JR.,
Petitioners,

-vs-

JOHN A. RUDD, in his capacity as Judge for the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida, and

CHARLES M. McCLURE, in his capacity as Judge in the County Court of Leon County, Florida, for the Second Judicial Circuit,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

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Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

Respondents pray that this Court deny the petition for writ of certiorari heretofore filed seeking review of the judgment of the Circuit Court of the Second Judicial Circuit, in and for Leon

County, Florida, rendered August 3, 1978.

CITATIONS TO OPINIONS BELOW

The memorandum order of the Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida, which was unreported, is annexed as Appendix A. The Supreme Court of Florida denied a petition for writs of common law certiorari, prohibition, mandamus, and other relief in an order without published opinion, reported at 362 So. 2d 1050 (1978), which is annexed as Appendix B. The order of the Second Judicial Circuit denying admission pro hac vice of Millard C. Farmer, Jr., dated February 21, 1979, is annexed as Appendix C.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

I. Whether the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment require a state court to hold an evidentiary hearing, with prior notice of applicable legal standards and of specific instances of alleged misconduct, before it may deny an out-of-state attorney permission to represent a defendant pro hac vice in a state court.

II. Whether the First and Sixth Amendments and the Due Process Clause of the Fourteenth Amendment impose any limita-

tions on a state court's discretion in deciding whether to permit an out-of-state attorney to represent a defendant pro hac vice in a state court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the First and Sixth Amendments to the United States Constitution made applicable to the states via the Fourteenth Amendment to the United States Constitution.

2. This case involves Rule 2.060(b) of the Florida Rules of Judicial Administration:

> "Foreign Attorneys. Upon motion filed with a court showing that an attorney is a member in good standing of the bar of another state and that, under the rules of comity of the other state a member of The Florida Bar is permitted to appear in that state, attorneys of other states may be permitted to appear in particular cases in a Florida court. A request for an appearance shall be before oral arguments in an appellate court proceeding and before trial in a trial court. Attorneys of other states shall not do a general practice unless they are members of The Florida Bar in good standing."

3. This case involves Rule 9.030(a)(3) of the Florida Rules of Appellate Procedure:

> "Original Jurisdiction. The Supreme Court may issue writs of prohibition to lower tribunals in causes within the jurisdiction of the Court to review; writs of mandamus and quo warranto to state

officers and agencies; all writs necessary to the complete exercise of the Court's jurisdiction; or any justice may issue writs of habeas corpus returnable before the Supreme Court or any justice, a district court of appeal or any judge thereof, or any circuit judge."

STATEMENT OF THE CASE

On July 24, 1978, Michael J. Minerva, Esq., Public Defender for the Florida Second Judicial Circuit, filed a Motion to allow Petitioner Millard C. Farmer, Jr., Esq., the privilege of appearing pro hac vice on behalf of Petitioner Theodore Robert Bundy. The Motion was filed in the Circuit Court for the Second Judicial Circuit in and for Leon County, Florida. The

court, however, postponed a decision on the matter until it could be more fully informed of Petitioner Farmer's credentials.

On July 27, 1978, the grand jury for Leon County, Florida, returned its indictment in Case No. 78-670 (Circuit Court of Leon County, Florida), *State of Florida v. Theodore Robert Bundy*, charging Petitioner Bundy with murder in the first degree, attempted murder in the first degree, and burglary. At the time of the indictment, Petitioner Bundy was represented by the Office of the Public Defender for the Second Judicial Circuit, in and for Leon County, Florida. On July 28, 1978, Petitioner Bundy was afforded a first appear-

ance hearing before the Honorable Charles M. McClure.

At the first appearance hearing, Petitioner Bundy filed a *pro se* Motion requesting the representation of Petitioner Farmer. Judge McClure allowed Petitioner Farmer to speak on his own behalf; allowed Petitioner Bundy to express his desires; and allowed Assistant Public Defender Joseph M. Nursey, Esq., to speak with regard to the Motion. After careful consideration, Judge McClure exercised his discretion in denying the Motion and expressed his reasons for the denial — essentially, at the time there was a similar motion in the Circuit Court pending before the Honorable John A. Rudd, and consequently,

Judge McClure wished to allow the matter to be resolved by the Circuit Court.

On July 31, 1978, Petitioner Bundy was arraigned for the crimes charged in *State v. Bundy, supra*, before Judge Rudd. At the arraignment, Petitioner rejected the services of the Public Defender and requested representation by Petitioner Farmer. In order to properly rule on the motion, Judge Rudd set a hearing for August 2, 1978.

At the hearing, the following transpired: the court first entertained a motion by the State to extend the speedy trial period. The court granted Petitioner Bundy a ten (10) day period to

file a memorandum in opposition to the Motion. Next, Petitioner Bundy filed a Motion for Recusal of Judge Rudd which contained the signatures of both Petitioners. Petitioner Farmer's name had been scratched out. Judge Rudd read the Motion and then denied it. The following day, Judge Rudd entered a written order wherein he expressed the reasons for the denial — a failure to comply with the applicable rules dealing with such motions.[1]

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[1] Subsequent to this Motion for Recusal, Petitioner Bundy filed a second Motion for Recusal. On November 20, 1978, Judge Rudd denied the Motion. Petitioner Bundy then sought review of the denial via a Petition for Writ of Prohibition filed in the Supreme Court of Florida on November 30, 1978. On December 22, 1978, the Supreme Court of Florida granted the Writ and recused Judge Rudd. A new trial judge

Lastly, the court addressed the issue of Petitioner Farmer's pro hac vice appearance.

Petitioner Farmer began by expressing an interest in representing Petitioner Bundy. Furthermore, Petitioner Farmer wished, if possible, to associate himself with the Public Defender's Office which Petitioner Bundy had shortly before rejected. Petitioner Farmer conceded

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[1] Cont'd.

was then appointed by the Supreme Court. On February 20, 1979, Petitioner Farmer was afforded a full hearing on the issue of his pro hac vice appearance before the new trial judge. Petitioner Farmer was allowed to produce any and all evidence with respect to his admission to appear. Subsequent to the hearing, the Honorable Edward D. Cowart denied Petitioner Farmer the privilege to appear pro hac vice. (attached as Appendix C).

that he was not a member of The Florida Bar.

The Court asked Petitioner Farmer if he wished to make any statements with regard to his credentials. Petitioner Farmer stated that he was a member of the United States Supreme Court Bar; Fifth Circuit Court of Appeals; District Courts of Georgia; Supreme Court of Georgia; Court of Appeals of Georgia; all Emperior [sic] Courts of Georgia; American Bar Association; Georgia Bar Association; Atlanta Bar Association; American Trial Lawyers Association; and the Criminal Defense Lawyers Association. When asked if he had been admitted to practice in Florida on a case basis, Petitioner Farmer re-

sponded that he had been so admitted on one occasion in Miami, Florida. He had also been admitted in the past to appear pro hac vice in Louisiana, Mississippi, Alabama, South Carolina, North Carolina, South Dakota, and had never been denied a pro hac vice request. The court then inquired as to the status of the Petition for Certiorari in *Farmer v. Holton*, 146 Ga.App. 102 (1978), rehearing denied 146 Ga.App. 110, a case in Georgia where Petitioner Farmer was held in contempt of court on two occasions. Petitioner Farmer replied that it was still pending.[1]

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[1] Certiorari in the *Farmer v. Holton* matter has since been denied by the Georgia Supreme Court and the matter is now before this Court on a Petition for Certiorari in

Petitioner Farmer then wanted to "put up evidence" on the case if the court was going to consider the contempt citations and proceeded to go into the merits and factual setting of the case while repeatedly interrupting Judge Rudd. The court, however, did not want to get involved in a long discussion about the case.

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1 Cont'd.

Farmer v. Holton, Petition for Cert. filed 47 U.S.L.W. ___ (U.S. Dec. , 1978) (No. 78-). The facts surrounding the contempt citations are succinctly summarized by the Georgia Appellate Court in the decision reported at 146 Ga.App. 102 (1978), where the court quotes the relevant portions of the record which led to the contempt citations. At one point, the record reveals that Petitioner Farmer went so far as to call the trial judge by his first name in open court, in addition to repeatedly interrupting the court and refusing to abide by the court's instructions.

Petitioner Farmer was then asked whether he had spoken on the value of pretrial publicity as it affects the outcome of cases, a simple "yes" or "no" question. Petitioner Farmer repeatedly dodged and hedged around the question several times while espousing on ethics, the Constitution of the United States, and his rights under the Constitution. Petitioner Farmer never answered the question and further refused to answer a second question —whether he had co-signed the Motion filed by Petitioner Bundy to allow Petitioner Farmer to appear pro hac vice.

The State then argued against the Motion, and Petitioner Farmer was allowed to respond. He stated that out-of-state

attorneys were regularly permitted to practice before Judge Rudd. He also cited the court to case law dealing with pro hac vice admission. Petitioner Farmer stated that a hearing was necessary to determine his fitness. Judge Rudd asked Petitioner Farmer if he was aware of the American Bar Association Standards which provide that justification for denying pro hac vice admissions exist when an attorney has been previously found in contempt of court. Petitioner Farmer again attempted to re-litigate the merits of *Farmer v. Holton*, supra, but Judge Rudd again stated that the merits of the case were irrelevant.

Petitioner Farmer then wanted to "put up evidence" to the effect that

other attorneys had been admitted pro hac vice in the past. The court replied that evidence was unnecessary as it acknowledged the fact. Petitioner Farmer then wanted to "put up evidence" with regard to his fitness. The court stated that evidence was unnecessary with respect to that point also. Petitioner Farmer then wished to make an offer of proof which, interestingly enough, consisted of the exact contents of the hearing to that point.

The court then concluded the hearing and stated that it would make a decision by the following day.

On August 3, 1978, the court

announced its ruling as promised in a written order (Appendix A). The court carefully weighed the rights involved, analyzed the case law, applied the standards set out by the case law and the American Bar Association, exercised its discretion and denied Petitioner Farmer the privilege of appearing pro hac vice. The Court stated its reasons for the denial: (1) Petitioner Farmer's contempt citations; (2) his disruptive conduct during his appearances before the Court; and (3) the frivolous, unfounded motion filed by Petitioner which did not satisfy the applicable rules was an example of the type of law Petitioner practiced — a type of practice which would

not be tolerated by the Court.

Subsequent to the denial, Petitioners filed a Petition for Writs of Common Law Certiorari, Mandamus, Prohibition, and any other appropriate relief. The Supreme Court of Florida denied the petitions without opinion on August 21, 1978 (Appendix B).

SUMMARY OF ARGUMENT

Petitioners have failed to demonstrate a need for this Court to exercise its certiorari jurisdiction. Initially, Petitioners cannot seek review of the Florida Supreme Court's order denying their requested relief as such relief was discretionary with the court. Florida law ex-

plicitly holds that where an individual has other avenues of relief available to him, extraordinary writs will not issue. In the instant case, Petitioners have avenues of relief which can be pursued in the event Petitioner Bundy is convicted. At that time, Petitioners can raise the instant issues on a direct appeal of the conviction. By granting the relief requested, the Supreme Court of Florida would have essentially usurped the normal appellate process, something chastized by Florida law. Therefore, in denying Petitioners relief, the Supreme Court did not necessarily address the merits of the Petitioners' claims. Accordingly, certiorari would be improper.

Second, this Court's recent disposition of *Leis v. Flynt*, ___ U.S. ___, 47 U.S.L.W. 3477, Case No. 77-1618 (decided January 15, 1979), very neatly disposes of all issues raised by Petitioners. By virtue of *Leis*, this Court has held that a state court's discretion in allowing pro hac vice appearances is not affected by the First, Sixth, or Fourteenth Amendments. Moreover, neither the defendant nor the attorney involved enjoys any constitutionally-recognized right which would require even a hearing prior to disposition by the state court of the motion for pro hac vice appearance. In that every issue raised by Petitioners has recently been treated and rejected by this Court, Petitioners

have failed to meet the jurisdictional guidelines set out by this Court in Rule 19 of the Supreme Court Rules.

Third, since the filing of this petition, certain events have transpired at the trial level which render this petition moot. Recently, Respondent Rudd (who originally denied Petitioner Farmer's Motion to Appear pro hac vice) was replaced as trial judge in Petitioner Bundy's case. A new trial judge was appointed by the Florida Supreme Court, and this judge, the Honorable Edward D. Cowart, conducted a new hearing on the question of Petitioner Farmer's appearance pro hac vice. The motion for appearance was denied again. In essence then, Petitioners have already

been afforded the relief they seek from this Court by virtue of this second hearing. Consequently, the issues raised by Petitioners are moot in that they have received the relief they request.

Finally, Petitioners do not seek review of a final judgment and, therefore, review is precluded under 28 U.S.C. §1257. The fact that the order of the Florida Supreme Court is not final is readily apparent from the events that have transpired since that order, i.e., a second hearing was conducted by the trial court. Nothing precludes any further hearings on the matter and, therefore, the matter will not be ripe for review until Petitioner Bundy is convicted (assuming he is con-

victed). If he is not convicted, the matter will be moot.

Overall, Petitioners have failed to show a substantial federal question which requires this Court's attention. As a result, this Court should deny the petition.

REASONS FOR DENYING THE WRIT

I.

THE SUPREME COURT OF FLORIDA PROPERLY EXERCISED ITS DISCRETION IN DENYING ALL RELIEF AS FLORIDA CASE LAW EXPLICITLY HOLDS THAT THE WRITS SOUGHT WILL NOT ISSUE UNLESS NO OTHER REMEDY EXISTS AND PETITIONERS HAVE OTHER ADEQUATE REMEDIES AVAILABLE TO THEM.

In the instant case, Petitioners sought the issuance of extraordinary writs

in order to seek the admission of Petitioner Farmer pro hac vice in a Florida State Court. However, in that Florida law is explicit in holding that such relief will not be granted where a person has other avenues of relief available, the Supreme Court of Florida properly denied all relief.

In its order denying relief, the Supreme Court failed to issue a written opinion. Therefore, it is impossible to conclusively determine whether the Court even addressed the merits of Petitioners' claims. It can be logically assumed that by not issuing a written opinion, the Court did not reach the merits of Petitioners' claims, but denied relief on jurisdictional

grounds. Florida case law is very clear with respect to this issue. Time and time again, Florida courts have denied granting similar relief because the person seeking relief had other available remedies. See *State ex rel. Harris v. McCauley*, 297 So. 2d 825 (Fla. 1974); *Pearson v. Pearson*, 342 So.2d 1018 (Fla. 4th DCA 1977); *State ex rel. Rash v. Williams*, 302 So.2d 474 (Fla. 3rd DCA 1974); and *Corbin v. State ex rel. Slaughter*, 324 So. 2d 203 (Fla. 1st DCA 1975) with respect to Prohibition. See *Brown v. Bridges*, 327 So. 2d 874 (Fla. 2nd DCA 1976); *Florida East Coast Railway Company v. Stager*, 189 So. 2d 194 (Fla. 3rd DCA 1966); *Noble v. McNeal*, 179 So. 2nd 126 (Fla. 1st DCA 1965); *Mapoles v.*

Wilson, 122 So. 2d 249 (Fla. 1st DCA 1960); *Brooks v. Owens*, 97 So. 2d 693 (Fla. 1957); and *Hastings v. Osius*, 104 So. 2d 21 (Fla. 1958); with respect to Common Law Certiorari. See *Shevin ex rel. State v. Public Service Commission*, 333 So. 2d 9 (Fla. 1976); and *Reese v. Golden*, 209 So. 2d 490 (Fla. 3rd DCA 1968), with respect to Mandamus.

These cases all hold essentially that the purpose of such extraordinary relief is not to usurp the normal appeal process. However, in the instant case, Petitioners clearly had other avenues of relief. For example, assuming Petitioner Bundy was convicted of the charges, he could raise the question presented to the

Florida Supreme Court as a point on appeal in his direct appeal of his conviction. Granting relief to Petitioners below, however, would usurp the normal appellate process which is condemned by the clear mandate of case law. Accordingly, the Florida Supreme Court properly exercised its discretion in denying Petitioners the relief requested.

II.

THE ISSUES RAISED HERE BY PETITIONERS ARE MOOT IN THAT THIS COURT HAS RECENTLY ADDRESSED THE ISSUES AND HAS DISPOSED THEM UNFAVORABLY TO PETITIONERS.

Petitioners argue that two interrelated interests were offended by the Florida Court's denial to allow Petitioner Farmer the privilege of appearing pro hac

vice: (1) Petitioner Bundy's right to have counsel of his choosing; and (2) Petitioner Farmer's interest in both his reputation and his employment in representing Bundy. Furthermore, Petitioners argue that the Due Process Clause imposes limitations on a state court's discretion in denying pro hac vice appearances. These issues have recently been addressed and expressly rejected by this Court in its recent decision in *Leis v. Flynt*, ___ U.S. ___, 47 U.S.L.W. 3477, Case No. 77-1618 (decided January 15, 1979). Therefore, no substantial federal question has been raised by Petitioners which would necessitate this Court's granting the Petition for Writ of Certiorari.

In *Leis, supra*, the facts parallel those in the instant case with one notable exception — in *Leis*, the attorneys were afforded no hearing whatsoever with respect to their pro hac vice appearance, whereas in the instant case, Petitioner Farmer was afforded a hearing where he had the opportunity to be heard by the Court prior to the denial. The facts in *Leis* reflect that at the defendants' arraignment, the defendants' local counsel presented an entry of counsel form listing two other attorneys as counsel for the defendants. Neither of the two lawyers was admitted to practice in Ohio. The case was then transferred to another trial judge who advised the two attorneys they

would not be allowed to represent the defendants. The attorneys then commenced a mandamus action in the Ohio Supreme Court seeking to overturn the denial of admission. They also filed an affidavit of bias and prejudice while seeking to remove the trial judge. The Ohio Supreme Court dismissed the petition but did remove the trial judge. The attorneys next initiated an action in Federal District Court where the United States District Court for the Southern District of Ohio held that the trial court violated the attorneys' rights by not holding a hearing. The court held that the attorneys enjoyed a property interest protected by the United States Constitution and there-

fore should have been afforded procedural due process. The Sixth Circuit Court of Appeals affirmed the District Court's holding that the trial court could not deny the motion to appear pro hac vice without affording the attorneys a meaningful hearing, the application of a reasonably clear legal standard, and the statement of a rational base for exclusion.

This Court reversed the Sixth Circuit holding that:

> ". . . the Constitution does not create property interests. Rather, it extends various procedural safeguards to certain interests 'that stem from an independent source such as state law.' [Citations omitted.] The Court of Appeals evidently believed that an out-of-state lawyer's interest in appearing pro hac vice in an Ohio court stems from some such independent source. It cited no state law authority for this proposition, however, and indeed noted that 'Ohio has no specific standards regarding pro hac vice admissions. . .' 572 F.2d at 879. Rather the court referred to the prevalence of pro hac vice practice in American courts and instances in our history where counsel appearing pro hac vice have rendered distinguished service. We do not question that the practice of courts in most States is to allow an out-of-state lawyer the privilege of appearing upon motion, especially when he is associated with a member of the local bar. In view of the high mobility of the bar, and also the trend toward specialization, perhaps this is a practice to be encouraged. But it is not a right granted either by statute or the Constitu-

tion. Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdiction. The States prescribe the qualifications for admission to practice and the standards of professional conduct. They also are responsible for the discipline of lawyers.[3a]

"A claim of entitlement under state law, to be enforceable, must be derived from statute or legal rule through a mutually explicit understanding. [Citations omitted.] The record here is devoid of any indication that an out-of-state lawyer may claim such an entitlement in Ohio, where the rules of the Ohio Supreme Court expressly consign the authority to approve a pro hac vice appearance to the discretion of the trial

court. Note 2, supra. Even if, as the Court of Appeals believed, respondents had 'reasonable expectations of professional service,' 574 F.2d, at 879, they have not shown the requisite mutual understanding that they would be permitted to represent their clients in any particular case in the Ohio courts.

"Nor is there a basis for the argument that the interest in appearing pro hac vice has its source in federal law. [Citation omitted.] The speculative claim that Fahringer's and Cambria's reputation might suffer as the result of the denial of their asserted right cannot by itself make out an injury to a constitutionally protected interest. There simply was no deprivation here of some right previously held under state law. [Citation omitted.] Further, there is no right of federal origin that permits such lawyers to appear in state court without meet-

ing that State's bar admission requirements. This Court, on several occasions, has sustained state bar rules that excluded out-of-state counsel from practice altogether or on a case-by-case basis. [Citations omitted.] These decisions recognize that the Constitution does not require that because a lawyer has been admitted to the bar of one State, he or she must be allowed to practice in another. See Ginsburg v. Kovrak, 392 Pa. 143, 139 A.2d 889, dismissed for want of a substantial federal question, 358 U.S. 52 (1958). Accordingly, because Fahringer and Cambria did not possess a cognizable property interest within the terms of the Fourteenth Amendment, the Constitution does not obligate the Ohio courts to accord them procedural due process in passing on their application for permission to appear pro hac vice before the

Court of Common Pleas of Hamilton County."

Leis v. Flynt, supra, at 3477-78.

Applied to the instant facts, *Leis* disposes of the issues raised by Petitioners. Initially, *Leis* holds that a defendant does not have an unqualified right to any attorney of his choice. An attorney must first either meet the requirements of the State involved, or be admitted pro hac vice. *Leis* is not the first case to hold as such, however. For example, prior case law has held that a person does not have a constitutional right to be represented by an unlicensed attorney. See *U. S. v. Hinderman*, 528 F.2d 100 (8th Cir. 1976). This exclusion

of unlicensed attorneys is justified in light of a compelling state interest -- allowing only the highest qualified persons possible to practice law in order to provide the most competent legal assistance and to keep the administration of justice and the standards of professional conduct unsullied. See *Cohen v. Hurley*, 366 U.S. 117 (1971). Furthermore, a state has an inherent power to "require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar." *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957) at 239. (In the case sub judice, Petitioner Farmer demonstrated his lack of proficiency in Florida law when he drafted

a motion for recusal which did not comport with the applicable rules.) In light of this case law, it is evident that a person does not enjoy a right to have anyone represent him/her. Accordingly, Petitioner Bundy's argument with respect to his "right" to have Petitioner Farmer represent him is moot and furthermore, has been adversely decided by prior case law.

The *Leis* decision also disposes of Petitioner Farmer's contention that he has a right to represent Petitioner Bundy. Florida law, as Ohio law, does not create any property interest which would justify Petitioner Farmer's claim here. *Leis* very succinctly holds that an out-of-state attorney enjoys no "property rights" which

would give rise to the protection of the Due Process Clause. In that this Court has held that no hearing is necessary, the question is moot.

Nonetheless, aside from *Leis*, the actions of the trial court below complied with the Due Process Clause of the Fourteenth Amendment as the hearing conducted below met the requirements of due process. The facts below reveal that Petitioner Farmer was afforded a meaningful hearing where he had the opportunity to be heard. Furthermore, the lower court complied with all previous case law prior to the recent *Leis* decision as it applied reasonably clear legal standards and denied the admission in a written order which contained

a rational basis for exclusion. See *Flynt v. Leis*, 574 F.2d 874 (6th Cir. 1978); *U. S. v. Dinitz*, 527 F.2d 1214 (5th Cir. 1976); *In re Evans*, 524 F.2d 1004 (5th Cir. 1975); *Ross v. Reda*, 510 F.2d 1172 (6th Cir. 1975).

With respect to the last issue raised by Petitioners, clearly *Leis* disposes of it also. In cases such as the one at hand, neither the Due Process Clause of the Fourteenth Amendment nor the First and Sixth Amendments limit the discretion of state court to deny pro hac vice appearances.

In *Leis*, a judge arbitrarily, without conducting a hearing, and without

giving any reasons, denied two attorneys the privilege of appearing pro hac vice. This Court's reversal of *Flynt v. Leis*, *supra* (which held that a hearing was necessary; that reasonably clear legal standards must be applied; and that a written statement of reasons was required when a court denies pro hac vice appearances), implicitly disposes of the argument that the Constitution of the United States imposes restrictions on a state court's discretion with respect to pro hac vice appearances.

Nonetheless, even had this Court not disposed of the issue in *Leis*, the previous standard set out by *Flynt* was followed by the lower court in the instant case. Certainly, were any limitations placed on a state court's discretion, the limitations would not exceed those set out by *Flynt*. In the case at hand, Judge Rudd did not arbitrarily deny Petitioner Farmer the privilege of appearing pro hac vice. The court conducted a hearing wherein it learned that Petitioner Farmer had been held in contempt twice. During the hearing, Petitioner Farmer demonstrated that he was wholly unfamiliar with Florida law and that he could not answer simple "yes" or "no" questions. He further repeatedly interrupted the court during the hearing. All of these facts considered, the lower court was fully justified in denying admission pro hac vice and so stated in a written

order applying clear legal standards. Accordingly, Petitioners do not present any reason why this Court should consider this case. Whether prior case law is applied or this Court's recent decision in *Leis*, the outcome is the same.

Rule 19 of the Supreme Court Rules provides in part:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> "(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court." (Emphasis supplied)

In that this Court has recently decided the issues and in any event, the lower court's decision comports with applicable prior decisions, Petitioners have failed to demonstrate a need for review by this Court.

III.

THE RELIEF SOUGHT BY PETITIONERS IS A HEARING BEFORE THE TRIAL COURT ON THE ISSUE OF PETITIONER FARMER'S PRO HAC VICE ADMISSION, WHICH RELIEF HAVING RECENTLY BEEN AFFORDED BY THE TRIAL COURT, RENDERS THE ABSTRACT LEGAL QUESTION RAISED BY PETITIONERS MOOT.

Petitioners are seeking relief from this Court in the form of a hearing before

the trial court where Petitioner Farmer can present evidence as to his fitness. Recently, on February 20, 1979, Petitioner Farmer was afforded such a hearing before the Honorable Judge Edward D. Cowart, the new trial judge in the trial of Petitioner Bundy. At this hearing, Petitioner Farmer was allowed to secure testimony from numerous witnesses and present any and all evidence he desired to introduce. On February 21, 1979, the trial judge again denied Petitioner Farmer the privilege of appearing pro hac vice (attached as Appendix C). In that Petitioners have already been afforded the relief they seek from this Court, there is no need for this Court to exercise its jurisdiction.

IV.

THIS COURT SHOULD NOT REVIEW THE INSTANT CASE AS THE FLORIDA SUPREME COURT'S ORDER IS NOT A "FINAL ORDER" WHICH IS SUBJECT TO REVIEW BY THIS COURT.

By the very terms of 28 U.S.C., §1257, the jurisdiction of this Court to review decisions of state courts is limited to "[f]inal judgments or decrees rendered by the highest court of a state in which a decision could be had. . . ." Respondent respectfully suggests that the decision rendered by the Florida Supreme Court is not a "final judgment" within the meaning of 28 U.S.C., §1257, and that the petition filed herein should be dismissed. *Whitus v. Georgia*, 385 U.S. 545 (1967); *Chapman v. California*, 405 U.S. 1020 (1972).

The finality requirement which has been with us since the Judiciary Act of 1789 is "[d]esigned to avoid the evils of piecemeal review," *Republic Natural Gas Company v. Oklahoma*, 334 U.S. 62 (1948), and is founded upon "considerations generally applicable to good judicial administration," *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945). The decisions of this Court make it clear, however, that the concept of finality should be given a practical, as opposed to a technical construction.

The fundamental question with respect to when a judgment is "final" is whether it can be said that there is nothing more to be decided or that there

has been an effective determination of the litigation. *Richfield Oil Corporation v. State Board of Equalization*, 329 U.S. 69 (1946). That is, for a judgment of a state appellate court to be final and reviewable, it must end the litigation by judicially determining the rights of the parties, so that nothing remains to be done by the trial court except the ministerial act of entering the judgment which the appellate court has directed. *Parker v. Illinois*, 333 U.S. 571 (1948); *Organization for Better Austin v. Keith*, 402 U.S. 415 (1971); and *Market St. Ry Co. v. Railroad Commission of State of Cal.*, 324 U.S. 548 (1945). This Court has made it clear that a state court judgment, to be within the

appellate jurisdiction of this Court, must be "final" in two senses: It must be subject to no further review or correction in any other state tribunal, and must be an effective determination of the litigation and not of mere interlocutory or intermediate steps therein.

Viewing the case at bar in the context of the finality requirements referred to hereinabove, it is patently clear that the judgments rendered by the Circuit Court or by the Florida Supreme Court are not "final" so as to confer jurisdiction upon this Court. An excellent example which evinces the lack of finality of the orders at issue here is the recent hearing conducted by the new trial judge with

respect to Petitioner Farmer's pro hac vice appearance. In spite of the two prior orders which are sought to be reviewed here, the lower court conducted yet a second hearing on the very same matter. These prior orders do not preclude any further hearings on the matter in the future. Clearly, then, the instant orders are not "final" in the applicable sense. Moreover, the issues raised herein may all be raised once again on direct appeal by Petitioner Bundy should he be convicted. This is but another example of the lack of finality that exists in the orders in question.

Overall, in that this case does not seek review of a "final order," this Court

should deny the Petition for Writ of Certiorari.

CONCLUSION

Wherefore, Respondents pray that this Court deny the Petition for Writ of Certiorari. Petitioners have failed to demonstrate any reason why this Court should exercise its jurisdiction.

Respectfully submitted:

JIM SMITH
ATTORNEY GENERAL

By_____
Miguel A. Olivella, Jr.
Assistant Attorney
General

The Capitol
Tallahassee, Florida

CERTIFICATE OF SERVICE

I, JAMES C. SMITH, Counsel for Respondents, and a member of the Bar of the United States, hereby certify that on the ___ day of March, 1979, I served copies of the Respondents Brief in Opposition to the Petition for Writ of Certiorari on Jack Greenberg, Esq., James M. Nabrit, III, Esq., Joel Berger, Esq., and John Charles Boger, Esq., at Suite 2030, 10 Columbus Circle, New York, New York 10019; and Anthony G. Amsterdam, Stanford University Law School, Stanford, California 94305, Attorneys for Petitioners, by a duly addressed envelope with postage prepaid.

_____
JAMES C. SMITH
ATTORNEY GENERAL

A P P E N D I X

APPENDIX A

APPENDIX A

IN THE CIRCUIT COURT
OF THE SECOND JUDICIAL
CIRCUIT, IN AND FOR
LEON COUNTY, FLORIDA.

CASE No. 78-670

STATE OF FLORIDA,

Plaintiff,

-vs-

THEODORE ROBERT BUNDY,

Defendant.

ORDER

This Cause came on to be heard upon motions filed by Theodore Robert Bundy and Millard Farmer, for an Order permitting Millard Farmer to appear pro hac vice on behalf of Theodore Robert Bundy, in Case No. 78-670. The Court has carefully considered all of the issues raised by the motions with regard to the facts and the controlling law. Given the importance of this ruling both to the movants as well as the State, the Court has sought to expedite ruling while setting forth in detail the reasons for the Order.

On July 27, 1978, Theodore Robert Bundy was indicted by the Leon County Grand Jury for inter alia, the multiple homicides that have come to be known as the Chi Omega murders. At the time of the indictment Defendant was incarcerated in the Leon County Jail for criminal conduct unrelated to the homicides. When the Defendant was arraigned on July 31, 1978, for the crimes charged in the July 27, 1978 indictment, he declined the services of the Public Defender. Rather, Defendant demanded that Mr. Millard Farmer, an Atlanta attorney and not a member of the Florida Bar, be permitted to represent him. The issue then is whether the Court, in the sound exercise of discretion, should permit a member of the Georgia Bar to represent the defendant in Case No. 78-670.

In ruling on this motion the Court has been governed by two overriding considerations. First, that the Sixth Amendment guarantee is an important right of criminal defendants and not lightly considered. Secondly, in order for the defendant to be given fair trial, there is an absolute requirement that the court maintain a level of decorum commensurate with the seriousnessof the event.

It is accepted practice of the judiciary in this State to permit, on proper motion, the appearance of foreign counsel pro hac vice. Although there is some discrepancy regarding the requirement of a co-counsel member of the Florida Bar (Compare; Integration Rule of the Florida Bar, Art. II, Sec. 2; with Fla. R. App. P. 9.440 (a)) there can be little argument on the discretion given to trial judges ruling on pro hac vice motions by both rules. Despite the discretionary nature of the rules, the Courts of this Circuit and the State have been most liberal in granting pro hac vice motions. In fact, this Court has never denied such motion, has generally welcomed foreign counsel into court, and has always treated foreign counsel with a level of respect and courtesy consistent with Florida's Code of Judicial Conduct. Therefore, it is with no small sense of gravity that the Court orders these motions DENIED.

The ruling on these motions bottoms on the Sixth Amendment to our Federal Constitution. At the August 2, 1978 hearing on the Bundy/Farmer motions, Mr. Farmer relied on two cases which do not necessarily support his motion and in any

event are factually distinguishable. First, he relies on In Re Evans, 524 F.2d 1004 (CA 5th 1975). In that case the appellate court granted a writ of mandamus ordering instatement of a pro hac vice attorney who had been denied appearance by the trial court. The court held that a Federal District Judge has no discretion to deny a pro hac vice motion. "in absense of a complaint rising to a level justifying disbarment." However, Mr. Farmer failed to cite the case of US v. Dinitz, 538 F.2d 1214 (CA 5th 1976), which substantially weakens the Evans holding. There the Court found that a defendant's sixth Amendment rights had not been abridged where the Federal District Court refused to hear the defendant through his chosen attorney. The court maintained that the standard of review in cases such as Dinitz is whether the trial judge abused discretion. The court held that the Sixth Amendment does not displace judicial discretion in the governance of attorneys who appear in Court. The responsibility of the trial judges in regulating (within reasonable limits) the conduct of court practice does not necessarily do violence to any Sixth Amendment rights.

Second, Mr. Farmer relies on the case of Flynt v. Lies [sic] 574 F.2d 874 (CA 6th 1978) for the contention that he has a right to appear pro hac vice. However, Flynt merely holds that an out of state attorney was denied procedural due process when a State Court approved counsel of record forms and subsequently denied the attorney's pro hac vice motion. Mr. Farmer has never been an attorney of record in any proceeding before this Court and therefore under Flynt his 14th Amendment rights could not have suffered. The Court in Flynt did not rule on the denial of any of the defendant's rights. Although this court is not unmindful of Mr. Farmer's 14th Amendment rights, there are, after all, greater concerns at issue in the case, to-wit: guaranteeing Mr. Bundy a trial in a courtroom atmosphere of fairness, calm and reason.

Nonetheless, the Flynt case is instructive on another critical point. The case suggests that due process demands that a trial court's ruling on a motion of this nature apply a reasonably clear legal standard and a statement of the basis for any exclusion. For purposes of this

case and in similar cases in the future this Court will utilize the standards promulgated by the ABA in "Standards Relating to the Function of the Trial Judge", Sec. 3.5 (1972). That Section reads as follows:

> 3.5 Attorneys from other jurisdiction. If an attorney who is not admitted to practice in the jurisdiction of the court petitions for permission to represent a defendant, the trial judge may
>
> (a) deny such permission if the attorney has been held in contempt of court or otherwise formally disciplined for courtroom misconduct, or if it appears by reliable evidence that he has engaged in courtroom misconduct sufficient to warrant disciplinary action;
>
> (b) grant such permission on condition that
>
> (i) the petitioning attorney associate with him as co-counsel a local attorney admitted to practice in the jurisdiction.

> (ii) the local attorney will assume full responsibility for the defense if the petitioning attorney becomes unable or unwilling to perform his duties, and
>
> (iii) the defendant consents to the foregoing conditions.

It should be noted that the concurring opinion by Judge Clark in Dinitz suggested a standard quite similr to the second part of Sub Section (a).

Applying these standards this Court has ample grounds upon which to deny the motion. First, Mr. Farmer's conviction for criminal contempt by a Georgia trial court has recently been upheld by a Georgia Appellate Court (see attachment). Although there is an outstanding petition for certiorari in the Georgia Supreme Court, the record of the trial court proceeding is truly shocking. The appellate court labeled Mr. Farmer's conduct as "insulting", "contemptuous" and "contumacious". A thorough reading of that opinion must lead one to the conclusion that Mr. Farmer's conduct during the trial in question was, by studied design, intended to provoke the

trial judge into intemperate remarks or precipitous acts which might result in a mistrial. This court simply cannot and, in fairness to the Defendant, will not allow these proceedings to become a bizarre circus where Mr. Farmer can play ringmaster for an audience that could not possible include a jury.

Second, the attached transcripts of the experience that this court has had with Mr. Farmer will show to any fair-minded person that Mr. Farmer's concept of a trial is grounded on some perverse principle of maximized obfuscation. These transcripts indicate that Mr. Farmer is incapable of a simple yes or no response, regardless of the simplicity of the question. This sort of conduct is dilatory and disruptive and in no manner advances the cause of a defendant, justice or respect for the law.

Finally, the attached Fla. R. Crim. P. 3.230 motion, prepared by Mr. Farmer and originally signed by him, conclusively shows that Mr. Farmer practices a frivilous [sic] kind of law that simply is not tolerated in this Circuit. Even a casual reading of the allegations contained in the motion indicates that at the least Mr. Farmer

treats facts cavalierly and at the worst purposefully misstates them. If this motion is the kind of motion that is routinely penned by Mr. Farmer (and this Court fervently believes that it is) we could no doubt expect a deluge of frivolous and dilatory motions that have no basis in fact and are totality beyond the bounds of reality.

Accordingly, based on the facts and law as above outlined, the court finds that the pro hac vice motions do not have sufficient support and are hereby denied.

DONE AND ORDERED, in Chambers, Tallahassee, Leon County, Florida, this 3rd day of August, 1978, nunc pro tunc August 2, 1978.

/s/ John A. Rudd
JOHN A. RUDD
Circuit Judge

Copies furnished to:

Millard Farmer
Michael Minerva, Public Defender
Larry Simpson, State Attorney
Theordore Robert Bundy

APPENDIX B

CORRECTED ORDER

IN THE SUPREME COURT OF FLORIDA

MONDAY, AUGUST 21, 1978

THEODORE ROBERT BUNDY, Petitioner, v. STATE OF FLORIDA, Respondent.	*	CASE NO. 54,793
THEODORE ROBERT BUNDY and MILLARD C. FARMER, JR., Petitioner, v. JOHN RUDD, etc., et al., Respondents.	*	CASE NO. 54,839 In the Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida 78-670

Respondents' Motion to Consolidate filed in the above styled causes is hereby granted.

These causes having heretofore been submitted to the Court on Petitions for Writs of Common Law Certiorari, Petition for Writ of Prohibition, Petition for Mandamus and Petition for Other Relief, it is ordered that the Petitions are denied.

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

TC
cc: Mr. Theodore Robert Bundy
Millard C. Farmer, Jr., Esquire
Albert J. Krieger, Esquire
Miguel A. Olivella, Jr., Esquire
Hon. John Rudd, Judge
Hon. Paul F. Hartsfield, Clerk

APPENDIX C

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT, IN
AND FOR LEON COUNTY, FLORIDA

CASE NO. 78-670

RECORDED IN THE PUBLIC
RECORDS OF LEON CO. FLA.
IN FILE BOOK PAGE NO
FEB 21 3 31 PM 1979
AS THIS IS THE 2ND DATE NOTED
FILED HEREON
CLERK OF CIRCUIT COURT

STATE OF FLORIDA,

Plaintiff,

vs.

THEODORE REOBERT BUNDY,

Defendant.

ORDER DENYING ADMISSION PRO HAC VICE

This cause came on to be heard upon Motion filed by the defendant for the appointment of out-of-state counsel, this Motion was filed on the 9th day of January, 1979. Prior to the filing of this Motion the Court had considered, pro se motions for the appointment of out-of-state counsel and had denied same. As a result of the aforesaid action the defendant and his out-of-state counsel sought review of the denial in the Florida Supreme Court, which review was denied on August 21, 1978 without opinion. Subsequent thereto relief was sought by the defendant and the out-of-state counsel in the United States District Court for the Northern District of Florida, Tallahassee Division. That complaint was dismissed with prejudice and relief denied; review was sought in the United States District Court of Appeals, Fifth Circuit, that Court on October 2, 1978 rendered its opinion, see Bundy, et al v. Rudd, et al, 581 F2d 1126, sustaining the decision of the Federal District Court ordering denial.

After the appointment of the undersigned as presiding Judge in this case the pro se Motion was again filed by the respondent,

this Court, mindful of the provisions of Florida Statute 38.07, granted hearing on the Motion treating that portion of the Motion that related to the rights of the out-of-state counsel as a Petition for Recondisera-tion. The Court further considered the Motion as a motion de novo in behalf of the defendant asserting his Sixth Amendment right to counsel of his choice. After hearing all of the evidence offerred by both the defendant and the State, and hearing argument from the specially appearing attorney in behalf of the out-of-state attorney and the defendant on his pro se Motion and being otherwise fully advised in the premises, the Court makes the following findings of fact:

1. That the out-of-state attorney seeking permission to appear pro hac vice, the Honorable Millard C. Farmer, Jr., is not a member of the Florida Bar, but is a member in good standing of the State of Georgia, is admitted to practice in Federal District Courts, District Court of Appeals, Fifth Circuit, and the United States Supreme Court.

2. That in his capacity as practicing attorney in the State of Georgia on two occasions has been held in contempt by the Courts of Georgia in connection with the case of State of Georgia v. George Street, the contempt being affirmed in Farmer v. Holton, 146 Ga. App. 102, and certiorari denied by the Supreme Court of Georgia as shown in State's Exhibit 3 on October 3, 1978.

3. The testimony before the Court clearly shows that the contemptuous conduct of the attorney in the cases above cited occurred during a proceeding before the Court in direct disobedience to an Order of the presiding Judge. While this Court did not attempt to re-try or re-decide the Orders of the Georgia Court it did receive evidence concerning the issues and occurrences.

4. In another Georgia case, State of Georgia v. Henry L. Willis, III, testimony before this Court shows that Millard C. Farmer, Jr. conducted himself in a course of conduct consistant

to the practice of confusion and avoidance. This term is not to be mistaken for the old common law doctrine of confession and avoidance, but is a course of conduct designed to confuse issues and avoid trial. This Court considers that the best interest of the defendant in the case at Bar is to have the issues before the Court tried before a jury of the defendant's peers and decide the issue of guilt or innocence.

Before the Court is a transcript of proceedings of a similar Motion filed in the Third Judicial Circuit of Florida before the Honorable Wallace M. Jopling. The applicant was denied admission in the Third Circuit by Judge Jopling.

That based upon the foregoing findings of fact this Court concludes that the Motion for Appearance Pro Hac Vice must be denied when these facts are applied to the following considerations of law, Rule 2.060(b) of the Florida Rules of Judicial Administration, as follows:

> "(b) Foreign Attorneys. Upon motion filed with a court showing that an attorney is a member in good standing of the bar of another state and that, under the rules of comity of the other state a member of The Florida Bar is permitted to appear in that state, attorneys of other states may be permitted to appear in particular cases in a Florida court. A request for an appearance shall be before oral arguments in an appellate court proceeding and before trial in a trial court. Attorneys of other states shall not do a general practice unless they are members of The Florida Bar in good standing."

The right of an attorney of another state to practice is permissive and subject to the sound discretion of the Court to which he applies for the permission to practice; that this right as it relates to a defendant's Sixth Amendment right to counsel of choice is subject to the restriction that the amendment informs jurisdiction and does not replace it; that a trial Court after a hearing on a defendant's motion may deny pro hac vice admission in an exercise of sound judicial discretion based upon standards reasonably applied with a

statement of rational basis for the exclusion. See United States v. Denitz, 538 F.2d 1214 (1976), Ross v. Reda, 510 F.2d 1173, Leis, Jr., et al v. Larry Flint, et al, cited by the United States Supreme Court January 15, 1979, 24 Crim. Law. Rep. 4155.

The American Bar Association has established standards relating to pro hac vice admissions which reads in part,

> "If any attorney who is not admitted to practice law in the jurisdiction of the Court petitions for permission to represent a defendant, the trial Judge may, deny such permission, if the attorney has been held in contempt of Court or otherwise formally disciplined for Courtroom misconduct, or if it appears by reliable evidence that he has engaged in Courtroom misconduct sufficient to warrant disciplinary action."

5. The right of the defendant under the Sixth Amendment to counsel is a right of competent counsel to conduct the proceedings the Court is trying and shall be the counsel of his choice unless there are compelling factual reasons to the contrary.

The defendant in this case is represented by the Public Defender of Leon County, an attorney knowledgeable in criminal law and competent. While this Court does not question the competency of Mr. Farmer it does question the conduct previously engaged in by Mr. Farmer and his adherence to the practice of confusion and avoidance. The Court feels that history would repeat itself in this case, if he is allowed to appear pro hac vice.

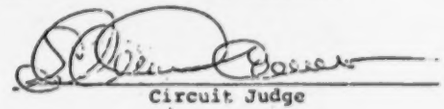
There has been no showing before this Court in the instant case by Mr. Farmer or by the defendant that comity of the State of Georgia is permitted by the attorneys of Florida, an additional requisite under the Supreme Court Rules.

Based upon the foregoing considerations of fact and law it is ORDERED AND ADJUDGED that on reconsideration of the Motion of Mr. Millard C. Farmer, Jr. for admission to practice before this Court pro hac vice the prior ruling of the trial Judge is affirmed

and Mr. Farmer's admission to practice in this case is denied.

6. That the Motion of the defendant to use counsel of his choice, Mr. Millard C. Farmer, Jr. is also denied on the basis of the standards and findings heretofore enumerated in this Order, to-wit: (a) The attorney's past pattern of conduct designed to directly impede the orderly administration of justice by confusing issues and avoiding trial; (b) the attorney's contemptuous conduct which has been reviewed and affirmed by the Appeals Court of his state, which violates the standards of the American Bar Association Standard 3.5(a); and (c) the defendant has local counsel that is competent to try the issues in this case.

DONE AND ORDERED entered this 21st day of February, 1979.



Circuit Judge

Copies furnished to:

The Honorable Lawrence Simpson
The Honorable Michael Minerva
The Honorable Joseph Nursey
The Honorable Millard Farmer, Jr.
Mr. Theodore Bundy

see

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